

STATE OF MICHIGAN
COURT OF APPEALS

CONTINENTAL INSURANCE COMPANY, a/k/a
CNA,

UNPUBLISHED
January 19, 1999

Plaintiff-Appellant/Cross-Appellee,
and

HEP & K PARTNERSHIP,

Plaintiff/Third-Party Defendant,

v

No. 207746
Kent Circuit Court
LC No. 96-003307 NZ

LAIDLAW WASTE SYSTEMS, INC.,

Defendant/Third Party Plaintiff-
Appellee,

and

MICHIGAN CONSOLIDATED GAS
COMPANY,

Defendant-Appellee/Cross-Appellant.

CONTINENTAL INSURANCE COMPANY, a/k/a
CNA,

Plaintiff-Appellee,

and

HEP & K PARTNERSHIP,

Plaintiff/Third-Party Defendant-

Appellee,

v

No. 208077
Kent Circuit Court
LC No. 96-003307 NZ

DONALD EDWARD SELBY, BARBARA JO
SELBY, MICHIGAN CONSOLIDATED GAS
COMPANY, HOMEWATCHERS, INC., JEFF
DUMAS, and PLAINFIELD TOWNSHIP,

Defendants-Appellees,

and

LAIDLAW WASTE SYSTEMS, INC.,

Defendant/Third-Party Plaintiff-
Appellant.

Before: Griffin, P.J., and Neff and Bandstra, JJ.

PER CURIAM.

This consolidated appeal arises out of the trial court's order summarily dismissing plaintiff's final claims against defendants. In docket number 207746, plaintiff CNA, successor to Continental Insurance Company, appeals as of right the trial court's order granting summary disposition to defendants Michigan Consolidated Gas Company (MichCon) and Laidlaw Waste Systems, Inc. (Laidlaw) pursuant to MCR 2.116 (C)(10), and dismissing as moot Laidlaw's third-party action against HEP & K Partnership (HEP & K). Also in docket number 207746, MichCon cross appeals and argues that the trial court should have taxed costs in MichCon's favor in light of the summary disposition granted in its favor. In docket number 208077, Laidlaw maintains that the court erred by failing to award it attorney fees in conjunction with the grant of summary disposition in its favor in docket number 207746. We affirm in part and reverse in part.

Facts

On February 20, 1997, a fourteen-year-old boy and two friends were walking through the parking lot of HEP & K's professional building in suburban Grand Rapids when the boy flicked a lighted cigarette into a dumpster containing combustible materials situated in an alcove at the rear of the building. The cigarette ignited the contents of the dumpster, causing a fire that spread to the sides and overhanging wooden deck of the building. Ultimately, falling debris either fractured natural gas meters on the outside of the building and/or gas lines attached to those meters, or the fire burned through the lines, portions of which were composed of plastic. The resultant conflagration destroyed the premises.

As a result of the inferno, CNA, HEP & K's insurer, paid the latter \$627,133 and then commenced a subrogation action against several defendants.¹ Pertinent to this appeal are the negligence actions filed against Laidlaw, owner and servicer of the dumpster pursuant to a written contract with HEP & K, and MichCon, supplier of natural gas to the building. In turn, Laidlaw filed a third-party complaint directly against HEP & K, alleging, relevant to this appeal, contractual indemnification from HEP & K if Laidlaw was found liable to HEP & K's subrogee, CNA.

On June 20, 1997, Laidlaw moved for summary disposition against CNA and third-party defendant HEP & K. The trial court granted the motion and dismissed the case against Laidlaw on the basis of a contractual indemnification provision. The trial court also granted MichCon's motion for summary disposition, thereby dismissing plaintiff's sole remaining claim. These appeals followed.

Docket Number 207746

CNA argues that the trial court erred in granting summary disposition pursuant to MCR 2.116(C)(10) in favor of defendant Laidlaw on the basis of contractual indemnification. We agree and hold that the trial court erred in ruling that no genuine issue of material fact existed as to whether defendant Laidlaw effectively disclaimed liability for its own negligence.

On appeal, this Court reviews de novo a trial court's decision regarding a summary disposition motion. *Roberson v Occupational Health Centers of America, Inc*, 220 Mich App 322, 324; 559 NW2d 86 (1996). A motion pursuant to MCR 2.116(C)(10) tests the factual basis of a claim. In reviewing such a motion, the test is set forth in *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996):

In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10), (G)(4).

Laidlaw's claim of contractual indemnity is based on paragraph five of the contract between Laidlaw and HEP & K, which provides:

5. Customer's Responsibility. Customer [HEP & K] shall provide a suitable site for the Equipment and hereby grants the Company [Laidlaw] the right of access to the Equipment at all reasonable times in order to provide the Service or inspect the Equipment. Company shall not be liable for and Customer waives any claims against Company for any damage to pavement or driving surface resulting from the Equipment or Company trucks servicing the Equipment. *Customer shall indemnify Company for any and all losses, damages, claims, or sums of money, including attorney's fees,*

incurred by the Company relating to: (a) loss of or damage to the Equipment, or the property of or injury to or death of any person(s), resulting from the use, operation or possession by Customer of the Equipment; or (b) Customer's breach of this Agreement. [Emphasis added.]

Whether the last sentence of paragraph five of the contract between Laidlaw and HEP & K is characterized as an exculpatory clause or an indemnity clause, the approach to the interpretation of both types of clauses is the same. *American Empire Ins Co v Koenig Fuel & Supply Co*, 113 Mich App 496, 498-499; 317 NW2d 335 (1982). The appropriate rules of construction are set forth in *Sherman v DeMaria Building Co, Inc*, 203 Mich App 593, 596-597; 513 NW2d 187 (1994):

While it is true that indemnity contracts are construed strictly against the party who drafts them and against the indemnitee, it is also true that indemnity contracts should be construed to give effect to the intentions of the parties. . . . In ascertaining the intention of the parties, the court must consider the language of the contract as well as the situation of the parties and the circumstances surrounding the contract. . . . Where an indemnity agreement is unclear or ambiguous, the intent of the parties is to be determined by the trier of fact. . . .

Michigan courts have discarded the additional rule of construction that indemnity contracts will not be construed to provide indemnification for the indemnitee's own negligence unless such an intent is expressed clearly and unequivocally in the contract. *Vanden Bosch v Consumers Power Co*, 394 Mich 428; 230 NW2d 271 (1975); *Fischbach-Natkin [Co v. Power Process Piping, Inc]*, 157 Mich App 448; 403 NW2d 569 (1987)], *supra*. Instead, broad indemnity language may be interpreted to protect the indemnitee against its own negligence if this intent can be ascertained from "other language in the contract, surrounding circumstances, or from the purpose sought to be accomplished by the parties." *Fischbach-Natkin, supra*, 452. [Citations omitted.]

Reviewing the pertinent clause in paragraph five under ordinary rules of contract construction and construing the contract in the light most favorable to plaintiff, we conclude that the indemnity clause at issue is not unlimited in the scope of its protection afforded to Laidlaw and that a genuine issue of material fact exists as to whether, under these particular circumstances, Laidlaw is exculpated from its own acts of negligence pertaining to its service. Although the clause does state that "Customer shall indemnify Company for *any and all* losses, damages, or claims . . .", this broad language is qualified immediately thereafter by the phrase "relating to: (a) loss of or damage to the Equipment, or the property of or injury to or death of any person(s), resulting from the use, operation, or possession by Customer of the Equipment. . . ." Thus, while the clause calls for indemnification arising out of HEP & K's use, operation, or possession of the equipment, the clause does not unambiguously or unequivocally extend to Laidlaw's own alleged acts of negligence.

Moreover, the circumstances surrounding formation of the contract provide no indication that the contracting parties intended paragraph five of the contract to absolve Laidlaw from all responsibility

for its own negligence in providing waste removal service under the contract. CNA's claim against Laidlaw is not based on a defect in the dumpster or on its own subrogor's use of the dumpster, but on Laidlaw's negligence in repeatedly placing the dumpster in an allegedly dangerous location when it came to dispose of the trash as part of its service.

The instant clause, with its qualifying language, contrasts with clauses that contain unequivocal language allowing for indemnification for the indemnitee's own negligence under the circumstances presented, and compares favorably to those cases holding that the clause in question did not allow for indemnity under the circumstances. Compare *Sherman, supra*, and *Hayes v General Motors Corp*, 106 Mich App 188; 308 NW2d 452 (1981), with *Beaudin v Michigan Bell Telephone Co*, 157 Mich App 185; 403 NW2d 76 (1986), and *Reed v St. Clair Rubber Co*, 118 Mich App 1; 324 NW2d 512 (1982). We therefore conclude that the trial court erred in granting summary disposition in favor of Laidlaw.

CNA next contends that the trial court erroneously granted summary disposition in favor of MichCon on the ground that there was no triable issue of material fact with respect to CNA's claim of negligence. CNA alleged that MichCon's misconduct fell into two categories: (1) the breaches of several ordinances and regulations regarding the safe maintenance of natural gas meters and above-ground service lines, and (2) the failure to police the subrogor's and Laidlaw's refuse collection and warn them of the allegedly dangerous proximity between the above-ground gas meters, regulators, and service lines and the dumpster.

A plaintiff must prove four elements in order to establish a prima facie case of negligence: "(1) that the defendant owed a duty to the plaintiff; (2) that the defendant breached that duty; (3) that the defendant's breach of duty was a proximate cause of the plaintiff's damages; and (4) that the plaintiff suffered damages." *Baker v Arbor Drugs*, 215 Mich App 198, 203; 544 NW2d 727 (1996). The existence of a duty is a question of law for the court. *Id.* The element of duty questions whether an actor has a legal obligation "to so govern his actions as not to unreasonably endanger the person or property of others." *Schultz v Consumers Power Co*, 443 Mich 445, 449; 506 NW2d 175 (1993), quoting *Clark v Dalman*, 379 Mich 251, 261; 150 NW2d 755 (1967). No single factor determines whether a party owes a duty to another. Rather, the courts examine a wide variety of factors, including the foreseeability and nature of the risk and the relationship of the parties. *Id.* at 450.

Examining plaintiff's first theory, it is well established that the violation of a penal statute by a party in a negligence action establishes a prima facie case of negligence that may be overcome by a showing of the party who violated the statute of an adequate excuse under the facts of the case, *Zeni v Anderson*, 397 Mich 117, 129-136; 243 NW2d 270 (1976), while violations of ordinances or administrative regulations may amount to evidence of negligence, *id.* at 142. We agree with the trial court that plaintiff has not shown any statute, regulation, or internal policy² that requires from MichCon "the conduct which [CNA] claims is missing."

Moreover, as the trial court aptly noted,

[H]ad MichCon done what plaintiff says was required of it, nothing would have happened differently. MichCon would have been obligated to construct a barrier around the meter and gas lines to prevent damage from lateral collisions. What caused the rupture of the meter or gas lines in this case was debris falling from above. About that no [sic] disagrees. That is dispositive because there is nothing in the rules which plaintiff seeks to impose on MichCon which would have required any shield from that kind of debris. In other words, had MichCon done what plaintiff says it should have done, the same debris would have fallen in the same place in the same way with, inevitably, the same results. There is no basis to conclude otherwise. *Alar v Mercy Memorial Hospital*, 208 Mich App 518, 531-532 [529 NW2d 318] (1995). Hence, MichCon's conduct, even if it was misconduct, was not a proximate cause of plaintiff's subrogor's loss. "Injuries that would have occurred anyway cannot be said to have been proximately caused." *Id.* at 531.

Plaintiff's second theory of recovery against MichCon is likewise deficient. It is well-recognized that natural gas is a dangerous substance and that "[a]nyone dealing with this commodity, because of its dangerous propensities, must exercise such care for the safety of others as a reasonably prudent man would exercise in the face of such potential danger," *Gadde v Michigan Consolidated Gas Co*, 377 Mich 117, 126; 139 NW2d 722 (1966). However, in this case, plaintiff argues that MichCon had a duty to learn that the placement of the dumpster in the building's alcove allegedly violated a township ordinance and, once aware of the purported violation, to inform HEP & K and/or Laidlaw regarding it. In other words, MichCon allegedly had a duty to police compliance with the ordinance. Aside from the obvious deficiencies in the proofs with regard to the requisite elements of causation and foreseeability, *Schultz, supra*, and *Baker, supra*, the law does not impose a duty predicated upon plaintiff's theory. Cf. *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495; 418 NW2d 381 (1988); *Read v Meijer, Inc*, 178 Mich App 624; 444 NW2d 381 (1989). We therefore conclude that the trial court properly granted MichCon's motion for summary disposition.

In light of this Court's affirmance of the trial court's order granting summary disposition in favor of MichCon, we agree with MichCon, as cross-appellant, that it was entitled to tax costs against the losing party. This issue arises from an admitted error by the trial court. When drafting its July 25, 1997, order awarding MichCon summary disposition, the court neglected to include a statement permitting MichCon, the prevailing party under MCR 2.625(A) and (B)(3), to tax costs. In the words of the court, "[i]t turns out, however, that in this case I just plain forgot." In its subsequent October 22, 1997, order denying MichCon's motion for costs, the court noted that it was unable to grant MichCon any relief because CNA had already appealed to this Court and the trial court, pursuant to *Admiral Ins Co v Columbia Casualty Ins Co*, 194 Mich App 300, 314-315; 486 NW2d 351 (1992), was without jurisdiction to modify the July 25 order. Because it clearly appears from the record that MichCon is entitled to receive costs from CNA and would have done so but for the trial court's error, this Court remands the case to the trial court for a determination and award of MichCon's costs.

In light of our decision in docket number 207746 to reverse the trial court's order awarding summary disposition in favor of Laidlaw, Laidlaw's request for attorneys fees as a prevailing party is moot.

Conclusion

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Defendant MichCon, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Richard Allen Griffin

/s/ Janet T. Neff

/s/ Richard A. Bandstra

¹ Several parties were named as defendants: the fourteen-year old boy, his parents, the parents of his friends, the township, the janitorial service, Laidlaw, and MichCon. Except for negligence claims against Laidlaw and MichCon, the other claims have been either settled or dismissed.

² The ordinances, regulations, and internal policies that are alleged by plaintiff to have been violated include the following: (1) a local prohibition against storing flammable waste in a way that creates a nuisance or hazard, or in a hazardous location or within fifteen feet from any building; (2) a federal regulation that above-ground gas transmission lines must be protected from accidental damage by vehicular traffic or other similar causes; (3) a federal regulation that outdoor terminals must be located where gas from the vent can escape freely into the atmosphere; (4) several federal regulations requiring gas operators to investigate, report, and keep surveillance on safety-related conditions; and (5) MichCon standards requiring meters and lines to be protected from damage by vehicles and other materials stored in the general area.